IN THE

Supreme Court of the United States

OCTOBER TERM 1975

No. 75-919

JOE ROSATO, *et al.*, *Petitioners*,

v.

THE SUPERIOR COURT OF THE STATE OF CALIFORNIA IN AND FOR THE COUNTY OF FRESNO, *Respondent*.

On Petition for a Writ of Certiorari to the California Court of Appeal, Fifth Appellate District

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE

MITCHELL ROGOVIN
KENNETH A. LETZLER
1229 19th Street, N.W.
Washington, D. C. 20036

Counsel for

McCLATCHY NEWSPAPERS;
THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS;
THE NATIONAL PRESS CLUB;
THE NEWSPAPER GUILD;
MELLETT FUND FOR A FREE AND RESPONSIBLE PRESS;
CALIFORNIA FREEDOM OF INFORMATION COMMITTEE;
FRESNO FREE COLLEGE FOUNDATION;
SIGMA DELTA CHI;
CALIFORNIA NEWSPAPER PUBLISHERS ASSOCIATION;
CALIFORNIA BROADCASTERS ASSOCIATION; THE NATIONAL ASSOCIATION OF BROADCASTERS;
and
THE NATIONAL NEWSPAPER ASSOCIATION, *Amici Curiae*

JOHN F. DOWNEY
555 Capitol Mall
Sacramento, California 95814

Counsel for

McCLATCHY NEWSPAPERS, *Amicus Curiae*

Of Counsel:

ARNOLD & PORTER
Washington, D. C.

DOWNEY, BRAND, SEYMOUR & ROHWER
Sacramento, California

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

IN THE

Supreme Court of the United States

OCTOBER TERM 1975

No. ———

JOE ROBATO, *et al., Petitioners,*

v.

THE SUPERIOR COURT OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF FRESNO, *Respondent.*

On Petition for a Writ of Certiorari to the California Court of Appeal, Fifth Appellate District

---

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

Pursuant to Rule 42(1) of the Rules of this Court, permission is sought for the filing of the annexed brief amicus curiae prior to consideration of the petition for writ of certiorari on behalf of the following parties: McClatchy Newspapers, The Reporters Committee for Freedom of the Press, The National Press Club, The Newspaper Guild, Mellett Fund For a Free and Responsible Press, California Freedom of Information Committee, Fresno Free College Foundation, Sigma Delta Chi, California Newspaper Publishers Association, the California Broadcasters Association, the National Association of Broadcasters and the National

Newspaper Association. Each of these organizations, as is more fully described in an Appendix to the attached brief, is intimately involved in the collection and dissemination of news and thus has a vital interest in the outcome of this case, where two reporters and two editors have been held in contempt for their refusal to disclose a confidential news source.

Permission for leave to file this brief was sought from the parties. However, counsel for respondent, The Superior Court, refused to grant permission, making necessary the filing of this motion.

Respectfully submitted,

MITCHELL RODGVIN
KENNETH A. LETZLER
1229 19th Street, N.W.
Washington, D. C. 20036

Counsel for
McCLATCHY NEWSPAPERS;
THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS;
THE NATIONAL PRESS CLUB;
THE NEWSPAPER GUILD;
MELLETT FUND FOR A FREE AND RESPONSIBLE PRESS;
CALIFORNIA FREEDOM OF INFORMATION COMMITTEE;
FRESNO FREE COLLEGE FOUNDATION;
SIGMA DELTA CHI;
CALIFORNIA NEWSPAPER PUBLISHERS ASSOCIATION;
CALIFORNIA BROADCASTERS ASSOCIATION; THE NATIONAL ASSOCIATION OF BROADCASTERS;
and
THE NATIONAL NEWSPAPER ASSOCIATION, *Amici Curiae*

JOHN F. DOWNEY
555 Capitol Mall
Sacramento, California 95814
Counsel for
McCLATCHY NEWSPAPERS,
Amicus Curiae

Of Counsel:
ARNOLD & PORTER
Washington, D. C.
DOWNEY, BRAND, SEYMOUR & ROHWER
Sacramento, California

IN THE

Supreme Court of the United States

OCTOBER TERM 1975

No. ——

JOE ROSATO, *et al., Petitioners,*

v.

THE SUPERIOR COURT OF THE STATE OF CALIFORNIA IN AND FOR THE COUNTY OF FRESNO, *Respondent.*

On Petition for a Writ of Certiorari to the California Court of Appeal, Fifth Appellate District

BRIEF AMICUS CURIAE IN SUPPORT OF PETITIONERS

MITCHELL RODGVIN
KENNETH A. LETZLER
1229 19th Street, N.W.
Washington, D. C. 20036

Counsel for

McCLATCHY NEWSPAPERS;
THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS;
THE NATIONAL PRESS CLUB;
THE NEWSPAPER GUILD;
MELLETT FUND FOR A FREE AND RESPONSIBLE PRESS;
CALIFORNIA FREEDOM OF INFORMATION COMMITTEE;
FRESNO FREE COLLEGE FOUNDATION;
SIGMA DELTA CHI;
CALIFORNIA NEWSPAPER PUBLISHERS ASSOCIATION;
CALIFORNIA BROADCASTERS ASSOCIATION; THE NATIONAL ASSOCIATION OF BROADCASTERS;
and
THE NATIONAL NEWSPAPER ASSOCIATION, *Amici Curiae*

JOHN F. DOWNEY
555 Capitol Mall
Sacramento, California 95814

Counsel for
McCLATCHY NEWSPAPERS,
Amicus Curiae

Of Counsel:

ARNOLD & PORTER
Washington, D. C.

DOWNEY, BRAND, SEYMOUR & ROHWER
Sacramento, California

INDEX

CITATIONS

CASES:

IN THE

Supreme Court of the United States

OCTOBER TERM 1975

No. ——

JOE ROSATO, *et al.*, *Petitioners*,

v.

THE SUPERIOR COURT OF THE STATE OF CALIFORNIA IN AND FOR THE COUNTY OF FRESNO, *Respondent*.

On Petition for a Writ of Certiorari to the California Court of Appeal, Fifth Appellate District

---

BRIEF AMICUS CURIAE IN SUPPORT OF PETITIONERS

INTEREST OF THE AMICI

This brief amicus curiae is filed in support of the Petition for Writ of Certiorari on behalf of the following parties as amici curiae: McClatchy Newspapers, The Reporters Committee for Freedom of the Press, The National Press Club, The Newspaper Guild, Mellett Fund for a Free and Responsible Press, California Freedom of Information Committee, Fresno Free College Foundation, Sigma Delta Chi, California Newspaper Publishers Association, California Broadcasters Association, the National Association of Broadcasters and the National Newspaper Association. In an Appendix to this brief there is set forth a descrip-

tion of each of the amici stating, as to each, the nature of its business, what its interest is in this proceeding, and any special relationship which it has to this case.

This Court will note that the amici represent the entire spectrum of the American news media including major organizations composed of publishers, editors, reporters, and broadcasters. These amici desire to be heard for a most compelling reason.

The decision below rests upon the proposition that the courts may convert the press into investigative arms of the Judiciary any time a reporter is believed to have any information about what appears to be a violation of a "gag order" or any type of judicial injunction. The amici believe that the press has an independence, founded in the Constitution, which precludes each branch of the government—be it Judicial, Legislative or Executive—from eroding the integrity of the press by forcing news reporters to become official investigative agents of government unless the government can show "a present danger" to a "subject of overriding and compelling state interest." Here, there is no such vital state interest. Indeed, the decision below is directly contrary to the state interest in a free and untrammeled press expressed by the state legislature in enacting a newsman's shield law.

STATEMENT OF THE CASE

This case arises out of a matter quite properly the subject of intense public interest in the Fresno, California community—the bribery indictment in the fall of 1974 of Messrs. Stefano, a city councilman, Aluisi, a prominent developer, and Bains, a former city planning commissioner. Shortly after the indictment was issued, the defendants moved for an order sealing the

grand jury transcript. The motion was consented to by the prosecution and was granted by the judge hearing the case on November 21, 1974. The next day, with the agreement of all defendants, the judge entered a sweeping "gag order" barring extrajudicial statements by, *inter alia,* the parties, their attorneys, and court officials.[1] There is no indication in either of the orders or in the transcript of the brief hearing held on November 21, 1974 that the court considered the effect these orders would have on the public's right to be informed on matters of local government or on the First Amendment rights of the press. Nor is there any indication that the court was asked to consider, or did consider, alternative methods of insuring that the defendants would receive a fair trial, such as a searching *voir dire* or a change of venue.[2]

Despite the sealing of the grand jury transcript and the entry of the "gag order," defendants Stefano and Aluisi moved for a change of venue. The Stefano motion was granted on January 3, 1975. On January 7, 1975, the court indicated it would grant the Aluisi motion. The cases were transferred to Oakland and Monterey respectively. Defendant Bains did not file a change of venue motion.[3]

---

[1] The briefest examination of this "gag order" shows that it is a "boiler plate" form borrowed from cases involving violent crimes. For example, the authorities were not barred from informing the public as to the danger presented by suspects not in custody.

[2] Recent decisions suggest that a careful *voir dire* will be sufficient to protect a defendant's rights even in the most notorious of cases. *See Murphy* v. *Florida*, 421 U.S. 794 (1975); *Calley* v. *Callaway*, 519 F.2d 184, 205-210 (5th Cir. 1975) (en banc).

[3] Defendant Stefano was subsequently acquitted; Aluisi was convicted; and the charges against Bains were dropped after he testified against the other two.

On January 12, 13 and 14, 1975, after the Stefano and Aluisi change of venue motions were acted on, The Fresno Bee published stories under the byline of Petitioners Rosato and Patterson which purported to disclose testimony before the grand jury that had indicted Messrs. Stefano, Aluisi and Bains. The stories related to a possible conflict of interest of city councilman Stefano on a matter which might shortly go before the City Council. Petitioners Gruner and Bort, the Managing Editor and City Editor of the Bee, subsequently testified, without rebuttal, that the articles contained nothing about Bains, the only defendant whose case had not been transferred to a venue other than Fresno, which had not previously been reported.

Subpoenas were issued to the four Petitioners requiring their appearance at hearings on whether or not a violation of the court orders had taken place. However, prior to calling any of the Petitioners, the Court first heard the testimony of 13 witnesses who had lawful access to the grand jury transcript. Each witness denied that he had furnished Petitioners a copy of the transcript. However, as the Court below noted, "it developed that there were several persons who had either access to the grand jury transcript . . . or who had copied the transcript . . . which persons were not called as witnesses." 124 Cal. Rptr. at 435.

Petitioners were then called and questioned as to the source of the stories. Each Petitioner testified that no person subject to the court order was the source of the story but refused to answer additional questions which might reveal the source, claiming a privilege under Section 1070 of the California Evidence Code ("the newsman's shield law") and the First Amend-

ment to the United States Constitution. The trial court found Petitioners in contempt, holding the newsman's shield law inapplicable to contempt proceedings and rejecting the First Amendment claim. Each of the Petitioners was sentenced to an indefinite term of confinement until he would respond to the questions posed.

On writ of review, the California Court of Appeal of the Fifth Appellate District affirmed most of the contempt citations, 51 Cal. App. 3d 190, 124 Cal. Rptr. 427 (1975). The California Supreme Court refused to review that decision, and Petitioners have timely sought review in this Court by writ of certiorari pursuant to 28 U.S.C. § 1257(3).

REASONS FOR GRANTING THE WRIT

I. The Decision Below Is in Conflict With This Court's Decision in *Branzburg* v. *Hayes*

In *Branzburg* v. *Hayes*, 408 U.S. 665 (1972), this Court explicitly recognized that news gathering is protected by the First Amendment and that "without some protection for seeking out the news, freedom of the press could be eviscerated." 408 U.S. at 681. Nonetheless, the Court refused to accord newsmen a constitutional privilege to protect the anonymity of news sources in the face of a good faith request by a properly constituted grand jury, holding that such a request for relevant information known to reporters supplied the required convincing showing of "a substantial relation between the information sought and a subject of overriding and compelling state interest." 408 U.S. at 700, quoting *Gibson* v. *Florida Legislative Investigation Committee*, 372 U.S. 539, 546 (1963).

This result rested in part on the historic role of the grand jury, the absence of any showing that the grand jury had abused its proper function, the fact that grand jury secrecy would limit the disclosure of the identity of the news source, and the fact that a contrary holding would require repeated interruption of grand jury proceedings. The Court was careful to state that "Nothing in the record indicates that these grand juries were 'prob[ing] at will and without relation to existing need,' " 408 U.S. at 700, and that "news gathering is not without its First Amendment protections, and grand jury investigations if instituted or conducted other than in good faith, would pose wholly different issues for resolution under the First Amendment." *Id.* at 707.

Mr. Justice Powell's separate concurring opinion expanded on this point, stating that the First Amendment shields a newsman from disclosing the identity of a confidential source when his testimony bears "only a remote and tenuous relationship to the subject of the investigation" or would not serve "a legitimate need of law enforcement." 408 U.S. at 710. Such a claim of privilege is to "be judged on its facts by the striking of a proper balance between freedom of the press and the obligation of all citizens to give relevant testimony with respect to criminal conduct. The balance of these vital constitutional and societal interests on a case-by-case basis accords with the tried and traditional way of adjudicating such questions." *Id.*

The great weight of lower court decisions since *Branzburg* have interpreted that case as establishing a qualified privilege for journalists where the demand for disclosure of a news source is made other than in the grand jury context. *See generally,* Goodale, *Branzburg* v. *Hayes and the Developing Qualified Privilege for Newsmen,* 26 Hastings L.J. 709 (1975). This view of *Branzburg* is seen, for example, in the two most recent federal court decisions to discuss the issue. In *Loadholtz* v. *Fields,* 389 F. Supp. 1299, 1301-02 (M.D. Fla. 1975), the court concluded that the forced disclosure of news sources should not be extended "beyond the limited confines of the criminal justice system" to a libel suit, particularly when there was no showing "that the information sought could not be gleaned from other sources." Similarly disclosure of a news source was not required in a civil case where the evidence sought "is relevant, but not essential to the resolution of the judicial controversy" and where alternative sources of information are available. *Apicella* v. *McNeil Laboratories, Inc.,* 66 F.R.D. 78, 82, 85 (E.D.N.Y. 1975).

Many other cases are to the same effect. For example, in *Cervantes* v. *Time, Inc.,* 464 F.2d 986, 992-3 (8th Cir. 1972), *cert. denied,* 409 U.S. 1125 (1973), a libel case was dismissed on summary judgment despite the fact that the author of the allegedly libelous article had refused to reveal his confidential sources. The court stated:

> We are aware of the prior cases holding that the First Amendment does not grant to reporters a testimonial privilege to withhold news sources. But to routinely grant motions seeking compulsory disclosure of anonymous news sources without first inquiring into the substance of a libel allegation would utterly emasculate the fundamental principles that underlay the line of cases articulating the constitutional restrictions to be engrafted upon the enforcement of State libel laws.

The court held that to force disclosure of a confidential news source without some reason to doubt the defendant's assertion that the source was reliable would constitute harassment of the sort condemned by this Court in *Branzburg*. 464 F.2d at 995, n.12.

Similarly, in *Baker* v. *F & F Investment*, 470 F.2d 778 (1972), *cert. denied*, 411 U.S. 966 (1973), the Second Circuit refused to force a reporter to disclose the confidential source of information in a magazine article although the source apparently had information relevant to the pending litigation. The court held, 470 F.2d at 782, that:

> Compelled disclosure of confidential sources unquestionably threatens a journalist's ability to secure information that is made available to him only on a confidential basis—and the district court so found. The deterrent effect such disclosure is likely to have upon future "undercover" investigative reporting, the dividends of which are revealed in articles such as Balk's, threatens freedom of the press and the public's need to be informed. It thereby undermines values which traditionally have been protected by federal courts applying federal public policy.

In *Democratic National Committee* v. *McCord*, 356 F. Supp. 1394 (D.D.C. 1973), a qualified First Amendment privilege against the disclosure of news sources was recognized because of the public interest in continued vigorous press coverage of an issue of vital public concern, Watergate. The defendants in the civil suit arising from the Watergate break-in had sought to force newsmen covering Watergate to disclose their sources. The court blocked this attempt, noting that it could not "blind itself to the possible 'chilling effect'

the enforcement of these broad subpoenas would have on the flow of information to the press, and so to the public." *Id.* at 1397.

In *State* v. *St. Peter*, 132 Vt. 266, 315 A.2d 254 (1974), a journalist was asked who had informed him of the police raid which led to the criminal trial then being conducted. He refused to disclose his source, and the Vermont Supreme Court upheld his First Amendment privilege to so refuse absent the presence of other compelling interests:

> [W]e hold that, when a newsgatherer, legitimately entitled to First Amendment protection, objects to inquiries put to him in a deposition proceeding in a criminal case, on the grounds of a First Amendment privilege, he is entitled to refuse to answer unless the interrogator can demonstrate . . . that there is no other adequately available source for the information and that it is relevant and material on the issue of guilt or innocence." *Id.* at 256.

Brown v. *Commonwealth*, 214 Va. 755, 204 S.E.2d 429, *cert. denied*, 419 U.S. 966 (1974), applied the same test in upholding a reporter's refusal to disclose a source in another criminal trial. *See also People* v. *Marahan*, 81 Misc.2d 637, 368 N.Y.S.2d 685, 692 (1975) ("The information sought would not be of sufficient probative value or relevancy to warrant compelling the testimony sought here."); *Commonwealth* v. *Vitello*, 327 N.E.2d 819, 829 (Mass. 1975).[4]

---

[4] A similar approach may be found in pre-*Branzburg* cases as well. *See Cerrito* v. *Time, Inc.*, 302 F. Supp. 1071, 1075 (N.D. Cal. 1969), *aff'd per curiam*, 449 F.2d 306 (9th Cir. 1971); *In re Grand Jury January 1969*, 315 F. Supp. 662 (D. Md. 1970) and 315 F. Supp. 681 (D. Md. 1970).

In these cases, the lower courts properly interpreted *Branzburg* as holding that, where the subpoena does not emanate from a grand jury, a court should not force a journalist to disclose the source of a news story without first balancing a variety of relevant factors, including the chilling effect disclosure will have on future news stories; the existence of alternate sources for the information; the relevance of the inquiry; and the public interest served by disclosure.

An application of the balancing approach required in the non-grand jury context to the facts of this case requires a reversal of these contempt citations. On one side of the scale, it is clear that requiring disclosure of news sources would chill future stories on matters of intense local concern such as Councilman Stefano's apparent conflict of interest. The gravity of this harm to the First Amendment rights of the California press occasioned by forced disclosure of news sources has been recognized by the California Legislature in the enactment of a newsman's shield law, California Evidence Code § 1070. For a fuller discussion of the weight which must be accorded this legislative finding of fact, see pp. 15-20 *infra*.

There is no countervailing state interest which justifies such a limitation of press freedom. The proceedings in question were originally claimed to serve three purposes: (1) to make a record on potential prejudicial publicity in the trials of the defendants; (2) to vindicate an apparent violation of the court's gag order; and (3) to explore an apparent violation of the sealing order. Only the third point has a shadow of substance. No risk to a fair trial had been occasioned as to defendants Stefano and Aluisi, whose

cases had been transferred to another venue prior to both the hearings and the publication of the news stories. Nor did the contempt proceedings further the cause of justice as to defendant Bains, who remained to be tried in Fresno. The articles contained nothing about Bains that had not previously been in the public domain; and, if prejudice could arise from repetition, more prejudice flowed from the contempt hearings than from the original articles themselves. In fact, the charges against Bains were dropped after he testified against the other defendants.[5] *Cf. Commonwealth* v. *Vitello,* 327 N.E.2d 819, 829 (Mass. 1975) (no error in refusing to allow a defendant to question a newsman about the source of an allegedly prejudicial news story when a fair and impartial jury was nonetheless selected).

Nor was a substantial state interest presented by the alleged need to inquire into a violation of the gag order. That order was invalid *on its face* because it limited substantial First Amendment rights on no more basis than a finding that additional publicity "*may* interfere" with a fair trial. (Emphasis supplied). Indeed, the very decision below held that the proper standard for the issuance of a gag order is whether "there is *a reasonable likelihood of prejudicial news* which *would* make difficult the impaneling of an impartial jury," 124 Cal. Rptr. at 438-39 (emphasis supplied) citing *Younger* v. *Smith,* 30 Cal. App.3d 138, 106 Cal. Rptr. 225 (1973) and *United*

---

[5] In apparent recognition of the lack of relevance of Petitioner's testimony to the issue of prejudicial publicity, the trial judge asserted in his formal Findings and Order Adjudging Contempts of Petitioner Bort ¶ 18 only that the questioning was relevant to a possible violation of a court order.

States v. *Tijerina*, 412 F.2d 661, 666 (10th Cir.), *cert. denied*, 396 U.S. 990 (1969). The California courts have specifically held it improper to limit free speech, as was done here, on the "possibility" that some evil might occur. *Sun Co.* v. *Superior Court*, 29 Cal. App. 3d 815, 829-30, 105 Cal. Rptr. 873, 884 (1973). Hence, even under the standard accepted in California,[6] the gag order was invalid, and proceedings to determine whether an invalid order was violated obviously cannot provide the "overriding and compelling state interest" necessary to justify the chilling inquiry as to news sources.[7]

This leaves as the only valid state interest conceivably served by the inquiry into the Petitioners' sources the possibility that a person subject to the order sealing the grand jury transcript had violated that order. Under the circumstances of this case, the court's valid interest in vindicating its sealing order cannot justify the burden imposed on freedom of the press. First, all witnesses, including Petitioners, testified that no one subject to the sealing order was the source of the news story. With not one scintilla of evidence to the

[6] The proper standard for the entry of a gag order is, of course, a federal question, and other courts have imposed substantially stricter requirements than those followed in California. *See, e.g., CBS, Inc.* v. *Young*, 522 F.2d 234, 240 (6th Cir. 1975) ("clear and imminent danger" test). This Court recently granted certiorari to consider that issue in *Nebraska Press Association* v. *Stuart*, No. 75-817, and it would be appropriate to grant certiorari here on that issue as well.

[7] This is particularly the case because, under California law, the validity of a court order may be tested by disobeying it and challenging its validity in a contempt proceeding. *Younger* v. *Smith*, 30 Cal. App.3d 138, 151-52, 106 Cal. Rptr. 225, 233-34 (1973); *In re Berry*, 68 Cal.2d 137, 65 Cal. Rptr. 273, 281-82, 436 P.2d 273, 281-82 (1968).

contrary, this should have been the end of the inquiry.[8] And even if there were merit to the suggestion of the court below that the trial court was entitled to disbelieve the testimony (124 Cal. Rptr. at 449), it is clear that the unanimity of the witnesses on this point renders the information sought from Petitioners of far less relevance than would otherwise be the case.

Perhaps recognizing the weakness of this position, the court below suggested further that questions probing possible sources must be answered even if the response would only show carelessness on the part of a person subject to the sealing order in allowing the transcript to fall into Petitioners' hands. 124 Cal. Rptr. at 451. Assuming the validity of this novel doctrine of "contumacious negligence," the state interest in fereting out a negligent attorney is far less compelling than that in punishing a willful violation of a court order. Such an attenuated interest does not remotely approach that of a grand jury pursuing evidence of a crime, and cannot, consistent with *Branzburg* and its progeny, be allowed to outweigh First Amendment rights, particularly when other lines of inquiry remained to be explored. *Apicella, supra*, 66 F.R.D. at 85; *State* v. *St. Peter, supra*.

Significantly, there is no evidence in the record that the trial judge balanced these factors at all. Rather he expressly proceeded on an assumption that *no First Amendment issues were implicated in this*

[8] The County Counsel, who acted as "prosecutor" in the trial court, appeared to proceed on the assumption that no violation of the court order had taken place, but that Petitioners had "taken" the transcript without the knowledge of any person subject to the order. This, of course, was a matter for a grand jury, not a contempt proceeding.

case at all.[9] And, even if the trial judge had attempted to balance dispassio nately the competing interests involved, the record strongly suggests that he lacked the necessary detachment. For in the course of the proceedings below, the judge held a televised press conference during which he labeled press criticism of his conduct of the hearings "a biased presentation"[10] and subsequently denounced the press for putting "pressure" on him "individually."[11]

The court below could point to no evidence of a balancing of interests by the trial court but nonetheless assumed that such a process had taken place "impliedly" or "by necessity." 124 Cal. Rptr. at 443. The court below then indicated agreement with the assumed balancing of the trial court by an improper application to this case of the standards announced in *Branzburg* for the grand jury context, *Id.* at 443-4. Society's interest in a grand jury investigation of criminal conduct was unthinkably equated to the interest in searching for possible negligence among custodians of a transcript; no inquiry was deemed necessary through other sources of information; and a loose showing of relevance was tolerated.

---

[9] Early in the proceedings, the trial judge stated "In some instances there appears to be a conflict [between freedom of the press and the defendant's right to a fair trial], a whittling away of one at the expense of the other. *Such here is not the case.*" (Transcript of hearing of February 6, 1975 at 15) (emphasis added).

[10] See Transcript of hearing of February 6, 1975 at 14.

[11] Transcript of hearing of April 23, 1975 at 43. Under similar circumstances, this Court has required the recusal of a judge. *See, e.g., Johnson* v. *Mississippi*, 403 U.S. 212, 215-216 (1971); *Peters* v. *Kif*, 407 U.S. 493, 503 (1972); *Mayberry* v. *Pennsylvania*, 400 U.S. 455, 464 (1971).

The facts of this case, then, present a situation where at best newsmen were asked to disclose sources without a "compelling state interest" being thereby served. *Branzburg, supra,* 408 U.S. at 700. At worst, the case presents a probing for sources "at will and without relation to existing need." *Id.*

II. The Decision Below Is Inconsistent With This Court's Decision in *Bridges* v. *California*

The court below erred in failing to give any weight whatsoever in its evaluation of Petitioners' claim of a First Amendment privilege to the factual findings made by the California Legislature in enacting the Newsman's Shield Law, Evidence Code §1070. We submit that under this Court's decisions in *Bridges* v. *California,* 314 U.S. 252, 261 n.3 (1941) and *Wood* v. *Georgia,* 370 U.S. 375, 385-86 (1962), the findings of fact made by the California Legislature in passing the Newsman's Shield Law are conclusive on the California courts and this Court in evaluating First Amendment issues as to the disclosure of news sources.

This Court's decision in *Branzburg* rests heavily on its reluctance to erect a fixed constitutional rule on the basis of judicial fact-finding in an area conceived as more properly left to legislation. The Court stated that, despite an extensive record on the benefits and burdens which would flow from forced disclosure of news sources, it remained "unclear how often and to what extent informers are actually deterred from furnishing information when newsmen are forced to testify before a grand jury." 408 U.S. at 693.

Given the uncertainty as to the actual facts and the possibility that the balance would vary from time to time and place to place, this Court viewed the fac-

tual arguments presented to it as "treacherous grounds for a far-reaching interpretation of the First Amendment fastening a nationwide rule on courts, grand juries, and prosecuting officials everywhere." 408 U.S. at 699. Thus, the Court left the issue open for resolution by the fact-finding powers of the Congress and of state legislatures, 408 U.S. at 706:

> At the federal level, Congress has freedom to determine whether a statutory newsman's privilege is necessary and desirable and to fashion standards and rules as narrow or broad as deemed necessary to deal with the evil discerned and, equally important, to refashion those rules as experience from time to time may dictate. There is also merit in leaving state legislatures free, within First Amendment limits, to fashion their own standards in light of the conditions and problems with respect to the relations between law enforcement officials and press in their own areas.

This Court's reluctance to base a constitutional ruling on the resolution of a narrow factual question and its willingness to defer to narrow and careful legislative determinations of fact, even in the First Amendment context, is a matter of familiar law.[12]

[12] *See, e.g., Communist Party* v. *Subversive Activities Control Board*, 367 U.S. 1, 94, 96, 97 (1961) ("It is not for the courts to re-examine the validity of . . . legislative findings and reject them."); *Kovacs* v. *Cooper*, 336 U.S. 77 (1949) (upholding a narrowly and specifically drafted ordinance prohibiting "loud and raucous" soundtrucks); *Cantwell* v. *Connecticut*, 310 U.S. 296, 307-08 (1940) (reversing a speech-related conviction on disorderly conduct charges but suggesting that the same conduct could constitutionally be prohibited by a statute "exhibiting such a legislative judgment and narrowly drawn to prevent the supposed evil . . . ."); *Cox* v. *Louisiana*, 379 U.S. 559, 561-62 (1965) (narrowly drawn statute "prohibiting picketing near a Courthouse is constitutional); *See generally*, Cox, *The Role of Congress in Constitutional Determinations*, 40 Cinc. L. Rev. 199 (1971).

The California legislature has made such a narrow and careful determination of fact on the crucial issue of "how often and to what extent informers are actually deterred from furnishing information when [California] newsmen are forced to testify . . ." and it has expressed its finding in the form of a sweeping newsman's shield law, California Evidence Code, § 1070, which provides, in pertinent part, that newsmen:

> cannot be adjudged in contempt by a judicial . . . body . . . for refusing to disclose . . . the source of any information procured . . . for publication . . . .

While the court below failed to perceive the relationship of the legislative findings underlying the shield law to Petitioners' First Amendment claims, it was aware that "the Legislature in enacting Evidence Code section 1070 recognized the importance of maintaining a free flow of information and intended that the statute be given a broad rather than a narrow construction."[13] 124 Cal. Rptr. at 445. Nonetheless, the court held § 1070 *pro tanto* unconstitutional to the extent it would interfere with the power of a court to control its own officers, relying on a separation of powers principle inherent in the California Constitution.[14]

[13] The California Legislature has rejected attempts to weaken this provision, and has repeatedly strengthened it, most recently, by an amendment effective in January 1975 extending the statute's coverage to unpublished information, including notes, outtakes, photographs, tapes and other data.

[14] The court below relied upon *Farr* v. *Superior Court*, 22 Cal. App. 3d 60, 99 Cal. Rptr. 342, *cert. denied*, 409 U.S. 1011 (1972)

Significantly, the court's basis for finding the newsman's shield law unconstitutional as applied to Petitioners left untouched the legislature's factual finding that the threat to freedom of speech in California is so grave that forced disclosure of news sources cannot be allowed, even if some crimes will thus go unpunished.

These factual findings of the California Legislature which underlie the newsman's shield law come to this Court in a context indistinguishable from that presented in *Bridges* v. *California,* 314 U.S. 252 (1941), and, as in *Bridges,* control the factual determination upon which an evaluation of First Amendment principles must be based. In *Bridges,* this Court was faced with the action of a California court holding a newspaper publisher in contempt for an editorial written about a pending proceeding, in the face of a state law limiting contempts to statements "made in the immediate presence of such court while in session and in such a manner as to actually interfere with its proceedings." The California Supreme Court, citing the same decision relied upon for the *pro tanto* invalidation of the newsman's shield law by the court below, had struck down that provision as violative of the separation of powers doctrine of the California Constitution.

Although the statute itself could not shield the petitioners in *Bridges* from a contempt citation, the legislative findings as to the dangers inherent in such conduct were relied upon by this Court in holding the contempt citations unconstitutional as an infringement

---

and *In re San Francisco Chronicle,* 1 Cal.2d 630, 36 P.2d 369, 370 (1934).

on First Amendment rights. The Court stated, 314 U.S. at 261 n. 3:

> The California Supreme Court's decision that the statute is invalid under the California Constitution is an authoritative determination of that point. *But the inferences as to the legislature's appraisal of the danger arise from the enactment, and are therefore unchanged by the subsequent judicial treatment of the statute.* (Emphasis supplied).

See also Wood v. *Georgia, supra,* 370 U.S. at 385-86.

Here, as well, the inferences as to the legislature's appraisal that the danger to freedom of the press in California from forced disclosure of news sources far outweighs the incidental burdens on the enforcement of the criminal law created by a newsman's privilege are unchanged by the shield law's subsequent judicial treatment. This legislative fact-finding is controlling on courts in evaluating the interests involved in Petitioners' claim of a First Amendment privilege under the conditions now prevailing in California. The failure of the court below to recognize the weight to be accorded the legislative judgment led it to engage in its own balancing, to discriminate between the value of enforcing different laws,[15] and to reject erroneously the constitutional privilege claimed by Petitioners.

---

[15] By failing to honor the legislative fact finding expressed in the shield law and by exalting a court's interest in vindicating obedience to its orders above the interest of society in the enforcement of the criminal laws, the court below was engaged in making precisely the sort of legislative value judgments which this Court condemned in *Branzburg,* 408 U.S. at 705-06:

> . . . by considering whether enforcement of a particular law served a "compelling" governmental interest, the courts would be inextricably involved in distinguishing between the value of enforcing different criminal laws. *By requiring testimony*

The decision below thus obstructs precisely the sort of state legislative action dealing with the First Amendment rights of newsmen contemplated by this Court in *Branzburg* and leaves what the California legislature has found to be a violation of federal constitutional rights without a remedy. This Court has both the power and the obligation to protect federal rights and should do so here.

CONCLUSION

For the reasons set out above, the decision below is inconsistent with prior decisions of this Court. Given the sensitive nature of First Amendment rights and the widespread public interest in this case, allowing the judgment below to stand will both cause injustice to the Petitioners and chill the rights of others

---

from a reporter in investigations involving some crimes but not in others, they would make a value judgment that a legislature had declined to make, since in each case the criminal law involved would represent a considered legislative judgment, not constitutionally suspect, of what conduct is liable to criminal prosecution. *The task of judges, like other officials outside the legislative branch, is not to make the law but to uphold it in accordance with their oaths.* (Emphasis supplied).

similarly situated. A writ of certiorari should issue so that, upon full review, the decision below may be reversed.

Respectfully submitted,

MITCHELL ROGOVIN
KENNETH A. LETZLER
1229 19th Street, N.W.
Washington, D. C. 20036

Counsel for
McCLATCHY NEWSPAPERS;
THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS;
THE NATIONAL PRESS CLUB;
THE NEWSPAPER GUILD;
MELLETT FUND FOR A FREE AND RESPONSIBLE PRESS;
CALIFORNIA FREEDOM OF INFORMATION COMMITTEE;
FRESNO FREE COLLEGE FOUNDATION;
SIGMA DELTA CHI;
CALIFORNIA NEWSPAPER PUBLISHERS ASSOCIATION;
CALIFORNIA BROADCASTERS ASSOCIATION; THE NATIONAL ASSOCIATION OF BROADCASTERS;
and
THE NATIONAL NEWSPAPER ASSOCIATION, *Amici Curiae*

JOHN F. DOWNEY
555 Capitol Mall
Sacramento, California 95814
Counsel for
McCLATCHY NEWSPAPERS,
Amicus Curiae

Of Counsel:
ARNOLD & PORTER
Washington, D. C.
DOWNEY, BRAND, SEYMOUR & ROHWER
Sacramento, California

APPENDIX

APPENDIX

McClatchy Newspapers is the publisher of three newspapers in California, including The Fresno Bee, and operates eight radio and television stations in that state and one radio station in Reno, Nevada. It has received numerous awards and commendations for outstanding journalism, particularly in its coverage of local affairs. It is committed to excellence in seeking out and reporting news and thus has a strong interest in the rights of California newsmen to obtain stories on a confidential basis. McClatchy Newspapers has a particular interest in this case because the news articles which underlie the contempt citations appeared in The Fresno Bee, which is published by McClatchy Newspapers. Each of the Petitioners is an employee of The Fresno Bee, and their imprisonment would severely handicap that newspaper both in its day-to-day operations and in its coverage of local affairs through the use of confidential sources.

The Reporters Committee for Freedom of the Press was formed in Washington, D.C., in March 1970. It consists of members of the working press employed by newspapers, television and radio stations, and other media of communications. Over 100 of its members reside and work in California. The Committee is exclusively devoted to protecting the First Amendment interests of the working press and the freedom of the American people to receive news and information. It provides legal research, advice, representation, and funding to individual reporters and seeks to express the viewpoint of the working press on First Amendment questions. The Committee has filed amicus briefs in a number of cases, including several in the state and federal courts of California. Members of the Committee have appeared before Congressional Committees and have participated in the drafting of legislation, such as Evidence Code Section 1070, designed to protect newsmen. The Committee serves as a clearinghouse and source of information to the

press and the public about developments relating to the freedom of the press.

The National Press Club is a broadly-based national journalistic organization headquartered in Washington, D.C. It has 2,900 active journalists as members located in 49 states many of whom represent California news gathering organizations or are residents of California. The National Press Club is in close contact with other associations of journalists, sponsors educational programs for journalists, and takes stands on important issues affecting the practice of journalism. It is vitally important to each of the nearly 3,000 active-journalist members of The National Press Club that journalists retain their rights to seek information on a confidential basis, that the First Amendment rights of journalists not be abridged, and that statutes designed to recognize the rights of journalists be honored.

The Newspaper Guild is a labor union representing some 40,000 employees of newspapers, news services, magazines and related media in the United States, Canada and Puerto Rico, approximately half of whom are news and editorial department employees who have an active and continuing interest in asserting and maintaining the protection of news sources against forced disclosure and in assuring the maximum possible freedom of the press under the First Amendment. As long ago as 1934, at its first annual convention, the Guild approved a code of ethics declaring in part that journalists should refuse to disclose their sources of information "in court or before other judicial or investigating bodies"; the Guild's mandatory collective bargaining program requires that all Guild locals seeks to negotiate contractual protection against disclosure (and a number of locals have done so); and the Guild, and its locals, have worked and continue to work at both the federal and state level for the enactment of testimonial privilege for the press. Of the Guild's 85 local unions, seven are located in the state of California. The Guild has contracts with leading California newspapers, including those in San Francisco, Oakland, San Jose, Stockton, Long Beach, Bakersfield, San Diego and Sacramento. The Guild has had a contract with McClatchy's Sacramento Bee since 1945 and currently is in bargaining for the initial contracts with McClatchy's Modesto Bee and Fresno Bee, at both of which the Guild won National Labor Relations Board representation elections last year. Both are units of the Sacramento Guild Local. The Guild has some 4,000 members in the state of California, including Petitioners Rosato and Patterson.

Mellett Fund For A Free and Responsible Press is a non-profit foundation based in Washington, D.C. It was created in 1966 under a bequest from the late Lowell Mellett, former editor of the Washington Daily News, nationally syndicated columnist and advisor in World War II to the President of the United States. His bequest stated that the Fund should protect freedom of the press while working to establish "a relationship between the people and the press whereby full responsibility for its behavior would be met by the press." Its board of directors is made up of national journalists and journalistic scholars. In its activity to promote greater sensitivity to community needs by the press by retaining complete editorial freedom, the Fund financed voluntary press councils in six American cities from 1967 to 1969. In 1972 the Fund joined a consortium of national organizations under the egis of the American Civil Liberties Union to protect the news process from legal harassment. In 1973 the Fund was one of the cooperating foundations that created the National News Council, a voluntary panel that hears complaints against press performance and issues reports. The Mellett Fund enters this case as a friend of the court in its dedication to responsible journalism and its equal dedication to First Amendment protection of the right to uninhibited publication.

California Freedom of Information Committee is a nonprofit corporation established to work in the field of newsmen's right to access to information, open meetings and protection of confidential news sources under the California Shield law. The Committee, therefore, has a vital interest in the case at hand since it involves one of the Committee's basic responsibilities, protection of confidential news sources. The Committee is sponsored by professional chapters of the Society of Professional Journalists, Sigma Delta Chi; by California Newspaper Publishers; by Radio and Television News Broadcasters; by the Press Club; by Journalism Education; and by others.

Fresno Free College Foundation was formed in Fresno, California, in October 1968. It is a nonprofit corporation under Section 501(c)(3) of the Internal Revenue Code. The Foundation is supported by faculty members of California State University, Fresno, and by individuals in the community. It has approximately 100 active members. Its Articles of Incorporation commit the Foundation to the intellectual and cultural development of the Fresno community. It has sponsored lectures; underwritten timely publications, films and radio programs related to educational and academic personnel issues at the University; provided financial assistance to students; and undertaken financial and legal support for professors and students whose constitutional rights appeared to be violated by University authorities. In 1972 the Foundation filed an amicus brief on behalf of five foreign students who were seeking to enjoin the California State University and Colleges system from increasing fees to such students. In 1971 it gave financial and legal support to a Fresno County Planning Commissioner who had been discharged because of his exercise of First Amendment rights. It is presently constructing a listener-supported noncommercial radio station to serve the Fresno area. The Foundation asserts an interest in this case by virtue of its support of the need for

free and untrammeled news-gathering protected by the First Amendment.

Sigma Delta Chi: The Society of Professional Journalists, Sigma Delta Chi, is the oldest and largest journalistic organization in the nation. It represents more than 29,000 members in 260 campus and professional chapters in the print and broadcast media of whom more than two-thirds are working professional newspersons. It is the only national organization representing all elements in journalism and has 23 chapters in California with more than 1700 members.

It has long been in the forefront of attempts to obtain shield law protection for newspersons at both the state and federal level and to guard against erosion of First Amendment guarantees for the press. It believes that the confidential informant is one of the most important tools a journalist has in bringing to the public information about government. It further believes that, if sources are unprotected, the flow of information to the public about government will be severely restricted and the public will, in the end, be forced to rely for the most part on self-serving government statements about government operations.

California Newspaper Publishers Association is a nonprofit corporation organized under the laws of the State of California and having its principal place of business in the County of Los Angeles. It is composed of several classes of members, and the members include the publishers of 398 daily and weekly newspapers published in the state. It has as its purpose the promotion and advancement of newspaper publication in the state. Since its inception, the Association has been particularly concerned with the protection of freedom of the press under the First Amendment. The Association appears herein on behalf of itself and of its members.

The California Broadcasters Association is a state-wide, non-profit California corporation composed of 130 Cali-

fornia radio (both AM and FM) stations and television stations. The California Broadcasters Association has participated in rule-making and decisional proceedings before the Federal Communications Commission and other Federal, state and municipal regulatory agencies; it has likewise appeared and represented the California broadcast industry before the courts.

The National Association of Broadcasters (NAB) is a non-profit organization of radio and television broadcasters whose membership includes over 4,000 AM and FM radio stations, 540 television stations and all nationwide commercial broadcast networks. Approximately 250 of these radio and television stations are in California. The objective of the NAB, in accordance with its by-laws:

> . . . shall be to foster and promote the development of the arts of aural and visual broadcasting in all its forms; to protect its members in every lawful and proper manner from injustices and unjust exactions; to do all things necessary and proper to encourage and promote customs and practices which will strengthen and maintain the broadcasting industry to the end that it may best serve the public.

In keeping with these objectives, the NAB herein seeks to protect its members, including their employees, from the profound "chilling effect" of the decision reached by the court below. The NAB believes that a primary purpose of the radio and television media is the fair and timely gathering and presentation of news. Thus it is in the interest of all broadcasters that the freedom of the press continue to be unencumbered by undue and unlawful restraint and that broadcasters' First Amendment rights not be abridged.

The National Newspaper Association is a national trade association whose members include more than 5,000 weekly and smaller-city daily newspapers published throughout

the United States, over 280 of which are located in California. NNA strives to promote the best interests and improve the methods and standards of America's community newspapers. In these efforts, the Association works closely with affiliated state and regional associations and with other national newspaper groups and associations. It has filed briefs *amicus curiae* in legal proceedings affecting the press and has represented its members in testimony before Congress and administrative agencies.